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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. .....

EDWARD S. CANNON and CHARLES SMITH,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

I

GENERAL STATEMENT

Petitioners, Edward S. Cannon and Charles Smith, were indicated in the United States District Court for the Southern District of Texas, with two other defendants, for alleged violations of the Customs laws, and the Marihuana

Act, in four counts. The first count charged a conspiracy to unlawfully import marihuana, count two its unlawful importation, count three its unlawful receipt and concealment after importation, and count four its unlawful acquisition within the United States.

Petitioner Cannon filed a motion to suppress the evidence obtained by the search made by Customs agents of his automobile on the ground that such search was made without warrant authorizing the same, or by virtue of any warrant or process of law, and not made as incident to a lawful arrest and was in violation of his constitutional rights. (R. 14-17.) This motion was overruled, and a jury was then empanelled, and the case proceeded to trial. The evidence obtained by virtue of the search and seizure of ptitioner Cannon's automobile over his objection duly made, was offered in evidence, and which established that the agents found in the closed trunk of his automobile, a sack containing approximately thirty-nine pounds of marihuana. The prosecution relied upon this evidence to sustain all charges against petitioners. That without such evidence, none of the charges could have been sustanied, and as we feel confident that such statement will be conceded by Respondent, statement of the evidence of the trial therefore will be omitted herein.

Motions for judgments of acquittal on all counts were made on behalf of all defendants, and were overruled. That, as the conspiracy count charged that the object and purpose of defendants was to obtain marihuana in Mexico, unlawfully import it, and to thereafter transport it to New Orleans, Louisiana, to unlawfully sell same, and

as the evidence to sustain said charge was the possession by petitioner Cannon of the marihuana seized in his car, and as count four charged all defendants with the unlawful acquiring of said marihuana within the United States, at the close of the evidence, all defendants moved to compel the prosecution to elect which of the two counts it would rely for conviction (R. 239). Such motion was overruled. The jury found petitioners guilty under count one which charged the conspiracy to import the marihuana into the United States, and under count four which charged the unlawful acquiring of the same marihuana within the United States, and not guilty under counts two and three. The two other defendants were found not guilty on all counts. (R. 241.) Petitioner Cannon was sentenced to serve two years imprisonment on count one and eighteen months on count four to run consecutively, making a total term of forty-two months imprisonment (R. 243). Petitioner Smith was sentenced to serve two years imprisonment on count one and two years imprisonment on count four to run consecutively, making a total of four years imprisonment. (R. 244.)

II

STATEMENT OF FACTS AS TO MOTION TO SUPPRESS EVIDENCE

Petitioner Cannon testified that he was driving his automobile from Laredo, Texas, on a public highway in the direction of San Antonio, Texas. That he was forced to stop by Customs agents, and they forcibly searched his automobile, and in the trunk thereof, they found and took into their possession, a sack containing marihuana, and

then arrested him, (R. 21). One of the Customs agents who made the search testified that they saw petitioners and the two other defendants, cross the official bridge crossing from Mexico into Laredo, Texas. They saw them all get into a Mercury Sedan, and drive away. They followed them, and saw petitioner Cannon get out, and get into another car, which was a Studebaker Sedan, and drive in the direction the Mercury drove. They followed both cars, and because a train passed between the Mercury Sedan and their car, they lost sight of it, (but continued to follow the Studebaker, and followed it to certain tourists courts at Laredo, known as the Cactus Courts, where Cannon parked the car and went into one of the cabins. The officers waited across the road from the courts in their car, and later saw the Mercury driven by petitioner Smith come out from the courts. They followed it, but the court, over objection, refused counsel for petitioner Cannon permission to develop that they later stopped it, searched it, and found nothing, which the court thought immaterial (R. 29-30). That upon returning to Laredo, the officers recognized petitioner Cannon passing them in the Studebaker, and they turned around, signalled him to stop, searched the car, and forcibly opened the trunk in the rear, and therein found a sack containing marihuana. They then arrested petitioner Cannon (R. 32). The officers did not have a search warrant or a warrant of arrest. The officer testified that the reason of the search was that they had information petitioners were to arrange the purchase of marihuana in Mexico. Upon cross-examination, counsel for petitioner Cannon sought information as to the source of the alleged information. Government counsel objected thereto as being immaterial, and the court sustained the objection. (R. 26.)

It was about eleven hours before the search that they had the alleged information, and a United States Commissioner was available. (R. 33.)

III

ERRORS URGED IN COURT OF APPEALS

The substance of the errors urged in the Court of Appeals, briefly stated, is as follows:

1. The District Court erred in overruling petitioner Cannon's motion to suppress on the ground that the search was unlawful and not based upon probable cause, and was in violation of petitioner Cannon's rights under the Fourth Amendment to the Constitution of the United States.

2. The District Court erred in refusing to permit petitioner Cannon to examine the officer as to the identity of his informer, and which action of the court denied petitioner Cannon due process of law, particularly a deprivation of his right under the Sixth Amendment.

3. That the District Court erred at the close of the evidence in overruling defendants motion, requiring an election between counts one, the charge of conspiracy to import marihuana into the United States and the unlawfully acquiring of the same marihuana within the United States charged in count four.

4. That as the evidence obtained by the unlawful search of petitioner Cannon's automobile, was relied upon to convict all defendants, and without which evidence, none of the counts against any of the defendants could be sus-

tained, the District Court erred in overruling the motion of all defendants for judgment of acquittal on all counts.

IV

ACTION OF THE COURT OF APPEALS AND HOLDINGS BELIEVED TO BE ERRONEOUS

The Court of Appeals held as follows:

1. That the information which the officers had which they believed was reliable, "was sufficient in itself to justify the search."

2. That in addition to this information, the circumstances made the search unreasonable.

It is respectfully submitted that the circumstances without the hearsay information, fails to show probable cause to believe that marihuana was being transported in petitioner Cannon's automobile, and that there was therefore, no probable cause for the search without a warant and therefore the search and seizure was in violation of the Fourth Amendment to the Constitution of th eUnited States.

3. That the District Court did not err in refusing disclosure by cross-examination of the informer, especially when the alleged information was, as testified by the officer, the reason of the search.

It is respectfully submitted, that depriving petitioner Cannon of his right to cross-examination of the officer as to the source of his alleged information, thus precluded the Court from determining whether the information was re-

ceived, and whether the officer was justified in believing reliable, and deprived petitioner of due process of law.

4. The indictment charged in the alternative, that is, count one charged defendants conspired to obtain and procure marihuana, and import it, and thereafter transport it to destination to sell, and in furtherance thereof one of the defendants was transporting it (Overt Act 13, R. 10-11), and count four charged defendants with having unlawfully acquired the same marihuana within the United States, the court erred in holding it was not error to have overruled the motion of defendants at the close of the evidence, to elect between counts one and four.

It is respectfully submitted petitioners were convicted of acquiring the same marihuana in Mexico and also i nthe United States, and sentenced upon each charge to run consecutively. Only one of the alleged crimes petitioners could be guilty of not both, and such required an election at the close of the evidence.

5. That, as the evidence relied upon to convict both petitioners, was secured in violation of one's Constitutional rights, the court erred in holding that the District Court did not err in overruling motion for judgment of acquittal on all counts as to both petitioners.

V

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully show to the Honorable Court

that a Writ of Certiorari should be issued directing the removal of the cause to this Court, because:

1. The holding of the Court of Appeals that an officer who makes a search of an automobile or, as may be, other property, upon information received, cannot be examined as to the source of the information, is in conflict with the following authorities:

United States v. Keown, 19 F. Supp. 639;

United States v. Bluh, 45 F. (2d) 903.

And such holding deprives an accused person the right to cross-examine on material facts every witness who testifies against him, and deprives the accused of his right under the Sixth Amendment to the Constitution of the United States, "to be confronted with the witnesses against him."

United States v. Keown, 19 F. Supp. 639;

State v. Bigham, 133 S.C. 491, 131 S.E. 603.

The holding of the Court of Appeals that to avail a defendant the right to cross-examine an officer as to the source of his information, a defendant must show that such disclosure is necessary to predicate his defense on the merits, thereby refusing a defendant such cross-examination in a hearing before trial on a question raised in defense, that the search was unlawful, and the evidence obtained thereby, should be suppressed, and especially when the subject matter inquired of is material to the question for the court to determine, that is, did probable cause exist to authorize

the search, is a decision to an important question of general law in a way probably untenable, and in conflict with the above cited cases. This question has never been decided by the Supreme Court of the United States and said question is of great general and public interest, not only to the petitioners, but to the Government as well.

And as to such holding, and which the Court in *United States v. Keown, 19 F. Supp. 639*, held to the contrary, the court with respect to the importance of a controlling decision thereon, said:

> "The question which the court is called upon to decide in this case involves important principles, and I am deciding it in such form that my decision may be promptly reviewed by a higher court, and a uniform rule of law established for the guidance of executive officers. The field of administrative law is necessarily growing with great rapidity under our complex civilization, and the courts should establish with certainty what information in the hands of governmental departments is closed to judicial scrutiny."

2. The holding of the Court of Appeals that information received by the agents was of itself, sufficient, to justify the search, is, we submit, contrary to what this Court held as sufficient to constitute probable cause, in *Carroll v. United States, 267 U.S. 132*, and cases of this Court cited therein, that the good faith of the officer must be grounded on facts within his knowledge, and not merely grounded upon hearsay. And is in conflict with the Seventh Circuit in *Lawson v. United States 7th Cir., 9 F. (2d) 746*,

wherein that court after citing *Carroll v. United States, supra,* said:

That "probable cause must be determined by the existence of facts known to the officer before, not after, the search." (p. 746.)

And in conflict with the Fourth Circuit in *Elrod v. Moss, 4th Cir., 278 F. 123,* wherein the court said:

> "Under the federal as well as the state statutes, to justify search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused."

3. The holding of the Court of Appeals that in addition to the information received by the officers, there was probable cause to believe that marihuana was being unlawfully transported by petitioner Cannon, and that the search of his car and seizure of contents thereof was not unlawful, is in conflict with the holdings of this Court that the facts known to the officer must be such as to warrant a prudent man of reasonable caution in the belief that petitinoer Cannon was unlawfully transporting marihuana, which facts known to th eofficer, by themselves, were insufficient to establish. *Carroll v. United States, 267 U.S. 132.*

4. The holding of the Court of Appeals that the District Court did not err in overruling a motion to elect between the conspiracy count charging as the object thereof, to procure marihuana in Mexico, import it, and thereafter

transport it to a certain destination to sell, and in furtherance thereof, one of the defendants to the alleged conspiracy, was transporting marihuana in the United States, and a count charging the acquisition of the same marihuana within the United States, is a decision to an important question of general law in a way probably untenable.

Your petitioners present herewith specifications of errors and brief showing more fully their views upon the questions of law involved in the transcript of the record in the United States Circuit Court of Appeals.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case number and style on its docket, "Edward S. Cannon and Charles Smith, appellants, vs. United States of America, appellee, Number 11,675," to the end that this cause may be reviewed and determined by this Court as provided for by the Constitution of the United States and the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. .....

EDWARD S. CANNON and CHARLES SMITH,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT

The opinion of the United States Circuit Court of Appeals is not reported. It is included in the record at page 251.

II

JURISDICTION

1. The date of the judgment to be reviewed is December 27, 1946. Thereafter a rehearing was filed and was denied January 22, 1947.

2. The statutory provision to sustain jurisdiction of this Court is Section 240 of the Judicial Code as amended appearing in Title 28 U.S.C.A. 347.

III

STATEMENT OF THE CASE

The statement of the case has already been made in the petition, Articles I and II, and to avoid repetition we refer thereto.

IV

SPECIFICATION OF ERRORS

The judgment of the Court of Appeals and the Trial Court should be reversed and the cause remanded for a rehearing upon the following grounds:

1. The Trial Court should have sustained petitioner Cannon's motion to suppress and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so, for the following reasons:

(a) The alleged information of the officer could not be considered in determining whether probable cause existed to warrant the search, for the reason cross-examination as to the source of such information was denied petitioner Cannon.

(b) The alleged information was merely hearsay, and did not of itself constitute probable cause to warrant the search.

(c) The facts within the knowledge of the officers was not sufficient to warrant a reasonable cautious man to believe that marihuana was being transported in the car of petitioner Cannon.

2. The refusal of the Trial Court to permit petitioner Cannon cross-examination of the officer as to the source of his alleged information, deprived petitioner of his right under the Sixth Amendment to the Constitution of the United States "to be confronted with the witnesses against him," and secondly, the Court should have been given such information so that it might have determined whether or not the witness had reasonable cause to believe the information, and whether the information was reliable, and also to afford petitioner Cannon opportunity to impeach the witness.

The Court of Appeals erred in failing to reverse and remand the cause because of error of the Trial Court in refusing to permit said examination as aforesaid.

3. The Trial Court erred in overruling defendants motion to require the prosecution to elect whether it would rely upon the alleged agreement of defendants as charged in the conspiracy count to import marihuana from Mexico and also to have unlawfully acquired the same marihuana in the United States, and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so.

4. That as the evidence relied upon for conviction of both petitioners consisted of the evidence obtained by virtue of the unlawful search of the automobile driven by

petitioner Cannon, the Trial Court erred in overruling defendants motion made at the close of all evidence for judgment of acquittal of all defendants on all counts of the indictment, and the Court of Appeals erred in failing to reverse and remand the cause because of [redacted] such error.

V

ARGUMENT

A. Motion to Suppress Evidence.

Petitioner Cannon was driving an automobile on the public highway. He did not cross the Mexican border in the automobile, and which automobile never crossed the border. He was driving at a moderate rate of speed, and no act on his part gave any reason to warrant a reasonable prudent man that marihuana was in his automobile. The officers solely made the search "with the hope of securing evidence upon which to indict and convict" petitioners. *Taylor v. United States, 286 U.S. 1, 5.* That, as said by this court in *Carroll v. United States, 276 U.S. 132, 154:*

> * * * those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The officer testified that they made the search because he had information that petitioner Cannon, petitioner

Smith and another party, were to arrange the purchase of marihuana in Mexico. This solely being hearsay, was not of itself, as the Court of Appeals held, sufficient to constitute probable cause to warrant the search. Such holding is contrary to what this court said in the *Carroll* case as necessary to constitute probable cause, and its holding therefore is contrary thereto. In the *Carroll* case this Court referred to its holding in the case of *Director General v. Kastenbaum, 263 U.S. 25*, and cited therefrom as follows:

> "But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which, in the judgment of the court, would make his faith reasonable." 267 U. S. 132, 161, 162.

The holding of the Court of Appeals herein is also in conflict with Seventh Circuit in *Lawson v. United States, 7th Cir., 9 F. (2d) 746*, wherein the court said:

> "* * * probable cause must be determined by the existence of facts known to the officer before, not after, the search." (p. 746.)

And, also in conflict in *Elrod v. Moss, 4th Cir., 278 F. 123* wherein the court said:

> "Under the federal as well as state statutes, to justify search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused."

That while information may be considered by an officer in determining probable cause, such information must be confirmed by facts personally known to the officer before he makes the search. This appears clear by the decision of this Court in *Carroll v. United States, supra,* and the Court of Appeals herein has apparently given an erroneous interpretation of that decision, cited in its opinion.

That personal knowledge of the officer is essential to constitute probable cause as the *Carroll* case apepars to hold, and as is so construed by other lower federal courts. In *United States v. Allen, 16 F. (2d) 320,* the court cited the Carroll case, and referred to the facts therein, as follows:

> "The facts in the Carroll case, which led the Supreme Court of the United States to the conclusion that this rule had been met, and the search and seizure in that case was justifiable, showed that the prohibition officers, who made the seizure, some time prior to that time had a conference with the defendants Carroll and Kiro and arranged to purchase from them three cases of whisky. The defendants advised that they would go and get the liquor; they went and returned, or one of them did, and said he could not get the liquor that night. The defendants came to this conference in an Oldsmobile roadster, which was seen by the prohibition officers, and the number of the license tag was taken by them.
>
> "About two months later these same prohibition agents passed this same car, bearing the same license number, on a public highway going

westward, presumably from Detroit. The same men who agreed to sell the liquor at the previous meeting in Grand Rapids were in the automobile, and the court held that these officers, seeing and knowing the occupants of the car, knowing the car by the license tag which it bore to be the same car which said occupants used at the time of the agreement to furnish liquor in violation of the law, were justified in believing the car was being used to unlawfully transport intoxicating liquor, and were justified in searching and seizing same without a search warrant.

"Do the facts in the instant case measure up to the rule laid down in the Carroll Case? I do not think so. They show that the seizing officers had no personal knowledge whatever of the alleged unalwful transportation of liquor in the car seized; that they acted upon information (the source of which, or the reliability of which, was not disclosed) that a Studebaker sedan car, with blue headlights and a driving light in the center, would be, or might be, used on this road at the time in question for the unlawful transportation of liquor."

The facts within the knowledge of the officers in the nistant case, were in substance, as follows:

They saw petitioners and two others cross the official bridge from Mexico and get into an automobile and drive off. The car later stopped and petitioner Cannon got out and got into a car parked at a garage, and drive in the direction of the other car, and to certain tourist courts. Later petitioner Smith drove out from these courts, the officers followed him, and on returning recognized peti-

tioner Cannon passing them on the highway driving at a moderate rate of speed. They turned around, drove alongside of his automobile, compelled him to stop, forcibly searched his car, and found therein a sack of marihuana, and then arrested him. Those facts certainly do not measure up to the facts in the *Carroll* case, and the holding of the Court of Appeals that such facts alone constitute probabel cause, is certainly extending the ruling of this Court in the *Carroll* case far beyond that intended.

B. In depriving petitioner Cannon cross-examination of the officer as to the source of his alleged information upon which the search was instituted, deprived him of his right under the Sixth Amendment, "to be confronted with the witnesses against him."

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." Petitioner Cannon was charged with criminal violations, and the issue raised in the criminal proceedings involved the question whether the evidence secured by reason of the search of his car was lawfully acquired and admissible against him in the trial. The proceeding to suppress the evidence was ancillary to a criminal prosecution of Cannon. Such proceeding therefore could not have been determined by the court on the testimony of witnesses out of the presence of Cannon. The requirement of the personal presence of the witnesses is to afford the accused opportunity to cross-examine the witnesses against him. As to such a provision in the State Constitution of South Caro-

lina, the Supreme Court of that state, in the case of *State v. Bigham, supra*, said:

> "Article 1 Sec. 18 of the State Constitution provides:
>
> "In all criminal prosecution the accused shall enjoy the right * * * to be confronted with the witnesses against him."
>
> "This constitutional provision is generally held to require the personal presenc eof the witness so that the accused may be enabled to cross-examine him. 12 Cyc. 543, 22 C J 432, notes; 14 Ency. of Ev. 578; Ralph v. State, 124 Ga. 81, 52 S. E. 298, 2 L.R.A. (N.S.) 509, 4 Ann. Cas. 501; Territory v. Curran, 23 How. 421 Ann. Cas. 1918A, 234; Mattox v. United States, 156 U.S. 242, 15 S.Ct. 337, 39 L.ed. 409; State v. Weil, 83 S.C. 478, 65 S.E. 639, 26 L.R.A. (N.S.) 461."

And further said:

> "When the right of cross-examination is denied the accused, whether by reason of death of the witness or otherwise, his testimony in chief becomes incompetent." Citing text books and cases.

In *United States v. Keown, 19 F. Supp. 639*, the court passed upon the question as to whether an officer who made a search based upon information received, could be cross-examined, as to the source thereof, and held that a denial thereof constituted a violation of due process of law. The court emphasized the importance of the question, and cited the conflict of authority, and that this Court refused to

pass upon it in two cases, *Husty v. United States, 282 U.S. 694*, and *Segurola v. United States, 275 U.S. 106*, because of certain procedural grounds. That as neither ground is applicable hereto, it is hoped this Court will grant the Writ and settle the question. That court in concluding it was error to have sustained the search, and in not requiring the arresting officer to divulge the name of his informant, held that such denied defendant the right to cross-examine the witness, which right has found expression in the Sixth Amendment to the Constitution, and with respect thereto, said:

> "The officer may use the facts furnished by the informer as a basis for his own investigation and discover sufficient facts to search or arrest without disclosing the source of his information.
>
> "In the case here, the officers could have pursued the automobile until, from the conduct of the driver or a disclosure of the contents of the car, sufficient facts could have been ascertained to have legally made the search and arrest. Under such a state of facts, it would have been immaterial as to who the informer was, or from what source the officer obtained his information.
>
> "Every accused person has the right to cross-examine on material facts every witness who testifies against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the Fifth and Sixth Amendments to the Constitution. See Hale's History of the Common Law, page 145; Strakie on Evidence (2d Ed.) Vol. 1, page 160.

"When the government calls a witness whose testimony is based in part on that of an informer, it subjects the witness to cross-examination and the informer to whatever peril may arise out of such cross-examination. It is a sound rule to keep secret information furnished to the state of violations of its laws, but this commendable public policy must yield to a higher, or at least an equal, right accorded to an accused to have a court investigate the facts material to his offense in a criminal prosecution, and sometimes the departments of government will be put to a choice of either foregoing a criminal prosecution or disclosing the source of material information necessary to the conduct of orderly judicial procedure.

"The real ground of Agent Witherspoon's refusal to disclose the name of his informant was that he had been instructed by his superior officers to withhold such information. He should not be held in criminal contempt for failing to disclose the name of his informer. The better way to reach the question is to compel the United States to forego the use of the testimony by the agent favorable to it, unless willing to submit to a ful lcross-examination."

In the Keown case, the court cited *United States v. Blich, 45 F. (2d) 627* wherein the court pointed out that it was incumbent upon the witness to sustain his motives and his beliefs by all the evidence at his command, and cannot be "safely ensconced behind his blanket testimony that he was informed by a reliable person" (p. 645). The court also cited *Wilson v. United States, 3rd, Cir. 59 F. (2d) 390* wherein was involved a question as to whether

evidence obtained by a search and seizure should be suppressed, in a proceeding ancillary to a criminal prosecution. The witness refused to divulge the name of the member of the club who he said gave him a key to th epremises he searched, and the District Court admonished him to do so, and upon his failure to do so, was committed for contempt. The Circuit Court of Appeals sustained the action of the District Court upon the ground that such evidence was essential to the proper disposition of the case.

C. The Motion Requiring Election.

The indictment included four counts, the first a conspiracy to acquire marihuana in Mexico, unlawfully import it into the United States, and thereafter to transport it to a certain destination to unlawfully sell it, the second unlawfully importing marihuana, the third, the unlawful receipt and concealment thereof, and the fourth, the unlawful acquiring marihuana within the United States. The prosecutor no doubt charged the unlawful acquiring marihuana within the United States as an alternative charge to meet the evidence, but, as only one package of marihuana was involved, and which according to the thirteenth overt act to the conspiracy charge, was possessed by petitioner Cannon in his car (where it was seized) transporting it in furtherance of the object of the conspiracy as having acquired it in Mexico, imported it, and then transporting it to destination for sale, and if such were so, then petitioners could not have acquired the marihuana within the United States. They were either guilty under the evidence of either charge, and not both, therefore it was error

of the Trial Court in overruling the motion to elect between these counts made at the close of all the evidence.

D. Motion for Judgment of Acquittal.

The Court of Appeals appreciated, that under the ruling of this Court in *Anderson v. United States, 318 U.S. 350*, and *Glasser v. United States, 315 U.S. 60*, if the search be held unlawful, the conviction of both petitioners would follow, but held the search lawful.

For the foregoing reasons, it is respectfully submitted that the judgment of the Trial Court and its affirmance of said judgment by the Court of Appeals should be reversed, and a new trial awarded by this Court.

Respectfully submitted,

M. A. GRACE,
EDWIN H. GRACE,
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